STATE OF MICHIGAN

COURT OF APPEALS

ALESIA C. SULLIVAN,

Plaintiff-Appellee,

v

ROBERT LITTLE,

Defendant-Appellant.

UNPUBLISHED
July 26, 2005

No. 261518
Saginaw Circuit Court
LC No. 03-047219-NI

Before: Fitzgerald, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals by leave granted from a circuit court order denying his motion for summary disposition in this wrongful death action. The victim, Lydia Peters, was struck by defendant's vehicle as she walked on a roadway in Saginaw County. Plaintiff is the personal representative of Peter's estate. We affirm.

Defendant's sole argument on appeal is that he is entitled to summary disposition because the sole proximate cause of Peter's injuries is her own negligence. He contends that either he was not negligent at all or, assuming some negligence on his part, Peters was more than fifty percent comparatively negligent. We review a trial court's ruling on a motion for summary disposition de novo. *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for a claim. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In ruling on a motion for summary disposition under MCR2.116(C)(10), the trial court should consider the pleadings, affidavits, depositions, admissions, and other admissible evidence submitted by the parties in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). If the evidence does not establish a genuine issue of material fact, the moving party is entitled to a judgment as a matter of law. *Id.*

The standards for determining the comparative negligence of a plaintiff are the same as those of a defendant--the jury must consider the nature of the conduct and its causal relationship to the damages--and the question is one for the jury unless all reasonable minds could not differ. *Rodriguez v Solar of Michigan, Inc*, 191 Mich App 483, 488; 478 NW2d 914 (1991). In support of his motion for summary disposition, defendant relied on MCL 500.3135(2)(b) of the no-fault insurance act, MCL 500.3101 *et seq*., which provides that noneconomic "damages shall not be assessed in favor of a party who is more than 50% at fault." MCL 500.3135(2)(b). Defendant also relied on MCL 600.2955a(1), which provides:

> It is an absolute defense in an action for the death of an individual or for injury to a person or property that the individual upon whose death or injury the action is based had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability, the individual was 50% or more the cause of the accident or event that resulted in the death or injury. If the individual described in this subsection was less than 50% the cause of the accident or event, an award of damages shall be reduced by that percentage.

Defendant asserted that plaintiff was negligent in the following respects:

> 1. In failing to walk facing traffic as required under the statutes of the State of Michigan pertaining to pedestrian movement.
>
> 2. In failing to make appropriate observations of her surroundings so as to avoid walking directly into the path of Defendant at a time when it was unsafe to do so.
>
> 3. In having a BAC [blood alcohol content] of 0.16 as shown by a blood sample drawn during her treatment at St. Mary's.
>
> 4. In having an impaired ability to function within the meaning of MCL 600.2955(a).
>
> 5. In failing to take proper precautions for her own safety.
>
> 6. In attempting to cross the road at a point other than a designated crosswalk.
>
> 7. In attempting to cross the road without making proper observation.
>
> 8. In wearing dark clothing, during a rain storm, in an unlit location.
>
> 9. In otherwise failing to utilize her normal faculties as would a reasonable prudent person have done under the same and/or similar circumstances.

The trial court denied defendant's motion for summary disposition, stating that:

> In this particular case, the Court would note that but for the speed the Court would grant the motion for summary disposition. I am going to deny the motion for summary disposition . . . I believe there is a factual dispute as to proximate cause based on the speed.
>
> Under MCL 257.627(1), drivers of motor vehicles have the duty to
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> Drive at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface, and width of the highway and of any other condition then existing. A person shall not drive a vehicle upon

a highway at a speed greater than that which will permit a stop within the assured, clear distance ahead.

Similarly, pedestrians "must take such care for his own safety as a reasonable, careful, prudent person would do under similar circumstances." *Malone v Vining*, 313 Mich 315, 321; 21 NW2d 144 (1946). A pedestrian also has the "duty to make reasonable observations as to approaching traffic before placing himself in a position of danger therefore, and to observe the distance of approaching vehicles and their speed." *Erickson v Vendzah*, 340 Mich 556, 561; 66 NW2d 223 (1954), overruled on other grounds as recognized in *Weller v Mancha*, 353 Mich 189; 91 NW2d 352 (1958).

In this case, questions of fact with regard to the negligence of both parties exist that preclude a determination as a matter of law that plaintiff was more than fifty percent at fault for the accident. The parties stipulated that Peters was intoxicated at the time of the accident and had an impaired ability to function. Evidence was presented that Peters was walking in the roadway on a rainy night in an unlit area and that she was six feet from the curb at the point of impact. But there was also evidence that defendant was traveling between forty-two and fifty miles per hour in a thirty-five mile per hour zone. A question of fact existed regarding whether defendant's speed left him unable under the circumstances to maintain a reasonable and proper lookout while driving. Specifically, questions existed with regard to how hard it was raining, whether bright headlights coming at defendant obstructed his view, and whether Peters was wearing light or dark clothing.

Given the evidence of negligence on the part of both Peters and defendant, reasonable minds could differ regarding plaintiff's comparative negligence. If the trier of fact determines that Peter's own negligence was a proximate cause of her injuries and was equal to or greater than defendant's negligence in causing the accident in which plaintiff was injured, comparative negligence principles will ensure that plaintiff does not recover for Peter's own fault.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Donald S. Owens